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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ELISABETH S., Petitioner, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; SAN FRANCISCO DEPARTMENT OF HUMAN SERVICES et al., Real Parties in Interest.	A103535
MAURICE B., II., Petitioner, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; SAN FRANCISCO DEPARTMENT OF HUMAN SERVICES et al., Real Parties in Interest.	A103536 (San Francisco County Super. Ct. No. JD033013)

Maurice B's. mother and father have each filed a petition seeking extraordinary relief from the dependency court's order setting a hearing pursuant to Welfare and Institutions Code

section 366.26.[1] Mother contends the dependency petition failed to state a cause of action against her, the jurisdictional findings are not supported by substantial evidence, and the court improperly denied reunification services. Father contends the court failed to make a factual finding that it would not benefit the child to pursue reunification services, and there was no evidence the parents knew or should have known who had abused Maurice. We conclude the court did not err and deny the petitions on the merits.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2003, three-month-old Maurice was brought to San Francisco General Hospital (SFGH) by his eighteen-year-old mother. He was diagnosed with a broken leg.[2] A pediatrician noted the injury was unusual for so young a child, and indicative of abuse. An X-ray survey disclosed two additional fractures on the same leg. These injuries, known as metaphyseal lesions, were "classic and specific for abuse." A social worker from the San Francisco Department of Human Services (the Department) interviewed the parents, who claimed the injuries had resulted from the child's leg bending backwards in his car seat. The doctor, however, concluded that their explanation could not account for the injuries Maurice had suffered.

Maurice was detained and a petition was filed alleging he was a child described under section 300, subdivisions (a) (serious physical harm) and (b) (failure to protect). An amended petition filed in February 2003 added a count under subdivision (e), alleging Maurice was under the age of five and had suffered severe physical abuse. As noted in the dispositional report, the doctor had explained that the metaphyseal lesions could only be caused by pulling and twisting the leg, with separate jerking motions. The baby was in substantial pain, and the injury might have caused long-term damage.

The social worker was concerned that neither parent could explain the injuries, although Maurice was with them almost all the time. Mother continually stated, "It won't happen again," but had not explained what had happened. Father contested the medical diagnosis, and his

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[1] All further statutory references are to the Welfare and Institutions Code.

[2] The parents told the social worker they had tried to take the baby to UCSF Medical Center at Mt. Zion the morning after he woke with a bent leg, but they were turned away for lack of insurance. Two days later they took him to a clinic that directed them to SFGH.

personal credibility was in question.[3] The social worker explained her concern as follows: "If both parents are unable to acknowledge that their child['s] injuries are the result of non-accidental trauma, what assurance is there that they will be able to safeguard their baby from physical harm—or worse—in the future?"

The parents had not cooperated with requests for drug assessment and testing, although mother had admitted smoking marijuana when she was 17 and father was on probation for a drug offense. The parents had also been unusually hostile to the hospital staff and social workers involved in the case, prompting the writer of the dispositional report to observe: "The parents' inability to contain their agitation and aggression while attempting to conduct themselves in public begs the question of how they control it privately, and whether their son's injuries are a possible indication that perhaps they do not." The Department recommended that no reunification services be offered to the parents under section 361.5, subdivision (b)(6), based on the severe physical harm to the baby.

A contested hearing was held beginning April 24, 2003. The social worker who had written the detention report testified that the parents were loud, verbally abusive, and demanding when she interviewed them at the hospital. Father was "so explosive" that the social worker "was concerned . . . that someone might be hurt." After learning that he had recently been convicted of a drug offense, the social worker requested that the parents meet with a substance abuse counselor and submit to drug testing to exclude drug use as a contributory factor. The parents refused.[4]

A treating physician also testified, and was qualified as an expert in the diagnosis of child abuse. None of the family members who spoke with the doctor had been able to provide a sufficient explanation for the baby's multiple fractures. Other consulting physicians had agreed the injuries could not have occurred accidentally. Without treatment, the baby's injuries could have caused physical disability or disfigurement. The doctor was concerned about the parents' "lack of willingness to accept any responsibility for playing a role in this . . . in terms of the

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[3] For example, Father had made statements about where he lived and who else resided there that conflicted with other information obtained by the Department.

[4] The parties also stipulated that 20-year-old father had two sustained juvenile petitions involving drugs.

thought of them caring for the child." The doctor believed that only if the parents acknowledged what had really happened could their conduct change in the future.

Father called an unlicensed intern from the University of California Medical School Department of Psychiatry Child Trauma Research Project (CTRP), who had met with the parents and had observed them with Maurice on two occasions. She testified father's interaction with the baby was appropriate, and she was willing to continue to work with the family. Both parents had tried to soothe the baby when he was distressed. They told her a friend of mother's had hurt the baby, and at least one of them suggested they had trusted people they shouldn't have. The witness was not certified as an expert.

The social worker who had written the dispositional report testified about the parents' volatility and her concerns about their possible drug use, including its potential effects on the baby. Father had told the social worker he "sells drugs," and mother's sister had recently informed her that "mother asked her to provide her urine for a drug test." The social worker suspected the parents had injured the baby, based on their defensive hostility and drug involvement. Although they had attended sessions at the CTRP, they continued to resist services related to drug use. Nor had they acknowledged any problem with their treatment of Maurice.

The court found that Maurice was a child described under section 300, subdivisions (a), (b) and (e).[5] An out-of-home placement was ordered because the parents' explanations of the baby's injuries were not plausible, and the parents had problems with anger management and possibly substance abuse. The court also ordered no reunification services for the parents, pursuant to section 361.5, subdivisions (b)(5) and (c), explaining its conclusions that services

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[5] The court found true the following allegations in the second amended petition: Under section 300, subdivision (a), (1) the baby suffered three fractures of the left leg, including an oblique femur fracture and two metaphyseal lesions which the doctor stated were classic and specific for child abuse; (2) the parents' explanation was that the leg was twisted back in his car seat, while the doctor stated the injuries required pulling and twisting with separate jerking motions; (3) the parents stated the child was in severe pain and they had not been able to get treatment at the first two facilities they visited, while the doctor confirmed the fractures would cause terrible pain and possibly permanent damage to the leg; (4) the parents had problems with anger management and were hostile and verbally abusive with the staff of the Department. Under section 300, subdivision (b), (1) mother may have a substance abuse problem because she appeared agitated and refused to have a drug assessment; (2) father may have a substance abuse problem and refused an assessment; (3) the parents refused further interviews with the Department on one date, had not proceeded with random drug testing, and were hostile and verbally abusive with the staff of the Department. Under section 300, subdivision (e), the same allegations as under subdivision (a), for a child under the age of five. Several other allegations comprising a cruelty count under section 300, subdivision (i), added in a second amended petition, were found not true.

would not be likely to prevent reabuse and would not benefit the baby.[6] A permanency planning hearing was scheduled for October 1, 2003.

In July 2003, the court denied the parents' application for a rehearing of the referee's findings and order, having reviewed the record and exercised its independent judgment.[7] Each parent has filed a separate writ petition in this court.[8]

DISCUSSION

Mother first argues the petition failed to state a cause of action against her because it alleged neither by whom the child had been injured, nor failure to supervise and protect. She relies on the Third District's decision in *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397, which concluded that such a claim could be raised for the first time on appeal. There is a split of authority on that question, however. (See *In re James C.* (2002) 104 Cal.App.4th 470, 479-481; *In re Athena P.* (2002) 103 Cal.App.4th 617, 626.) Moreover, the *Alysha S.* court ultimately agreed with the father in that case that the allegations sustained at the jurisdictional hearing did not support the finding of jurisdiction. (51 Cal.App.4th at p. 395.) Here, we reach a contrary conclusion, as explained below. The alleged error was therefore harmless.[9] (*In re Athena P.*, at pp. 627-628; *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1036-1038.)

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[6] Section 361.5, subdivision (b)(5) states that reunification services need not be provided when "the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian." Section 361.5, subdivision (c) further provides that "the court shall not order reunification in any situation described in paragraph (5) of subdivision (b) unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent. The social worker shall investigate the circumstances leading to the removal of the child and advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful and whether failure to order reunification is likely to be detrimental to the child. [¶] The failure of the parent to respond to previous services, the fact that the child was abused while the parent was under the influence of drugs or alcohol, a past history of violent behavior, or testimony by a competent professional that the parent's behavior is unlikely to be changed by services are among the factors indicating that reunification services are unlikely to be successful."

[7] The baby's counsel opposed the application for rehearing, and had also joined in the city attorney's recommendation of no reunification services during the hearing before the referee.

[8] On its own motion, the court hereby consolidates the two petitions.

[9] We need not decide whether the argument was waived. We note that mother does not claim on appeal that the petition failed to notify her of the factual allegations she had to meet or to convey to her the Department's concerns. The record would not support such a claim, in any event.

Next, mother contends the evidence was insufficient to support the court's jurisdictional findings. We apply the substantial evidence standard of review, neither reweighing the evidence nor considering matters of credibility. (*In re E. H.* (2003) 108 Cal.App.4th 659, 669; *In re S. O.* (2002) 103 Cal.App.4th 453, 461; *In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318-1319.) All reasonable inferences are made in support of the court's findings and orders, and the record is viewed in the light most favorable to those orders. (*In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1226-1227.) In cases of conflicting evidence, full effect is given to the Department's evidence. (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881.)

The court here found jurisdiction under subdivisions (a), (b) and (e) of section 300. Subdivision (a) is applicable when "[t]he child has suffered . . . serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." (§ 300, subd. (a).) Mother relies on an alleged lack of direct evidence that she caused the child's injuries, or might injure him in the future. When the injuries have been shown to be nonaccidental, however, a presumption arises under section 355.1 that the child comes within the statute. The court's finding here is also supported by circumstantial evidence. (See *In re E. H.*, *supra*, 108 Cal.App.4th at p. 670.) There was evidence that the child was cared for by the parents, with a limited number of family and household members providing brief babysitting services, and that both mother and father had failed to take responsibility for the child's injuries or to adequately explain how they had occurred. Both parents were also unusually belligerent with the doctors and other professionals involved in the case, with mother threatening the social worker during one conversation by saying, "If I could just slap some sense in you." Substantial evidence supports the court's finding of jurisdiction under section 300, subdivision (a).

Section 300, subdivision (b) provides for jurisdiction when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." Mother contends the evidence did not show the child's injuries were connected to substance abuse, or that she had a substance abuse problem. The record indicates, however, that mother had admitted smoking marijuana during the previous year, and had asked her sister to provide urine

that mother could use for a drug test.[10] Mother also failed to comply with the social worker's repeated requests for drug assessment and testing. While the court concluded there was no direct evidence the parents were under the influence of drugs at the time the child was injured, it also noted its concern with regard to both parents "of being around the drug lifestyle and being involved with drugs." The court has held that in a child of "tender years . . . the absence of adequate supervision and care poses an inherent risk to their physical health and safety. [Citations.]" (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) The nature of the baby's injuries here unfortunately confirms that danger. Moreover, even assuming arguendo that jurisdiction was not adequately proven under subdivision (b), it was otherwise properly sustained under subdivisions (a) and (e), as discussed herein.

Section 300, subdivision (e) provides for jurisdiction when "[t]he child is under the age of five and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child." "Severe physical abuse" is defined to include "any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; . . . or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness." Mother argues the record did not support a finding the injury would have caused permanent harm if left untreated, or that the child's injuries resulted from more than one act of physical abuse. The treating doctor testified, however, that the child had suffered two different kinds of fractures, which were caused by different types of trauma.[11] She also opined that the injuries could have caused physical disfigurement and physical disability if left untreated. The dispositional report indicated the doctor had told the social worker that "the injury had possibly damaged the growth plates, which might result in impaired growth to the left leg and subsequent problems in walking. The injury might also have resulted in decreased range of motion in the leg."

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[10] Mother had also appeared "very agitated" when speaking with investigators at the hospital, a factor mentioned in the petition's allegations regarding her possible substance abuse.

[11] The treating doctor also testified that the oblique fracture could be dated based on the lack of callus formation, but metaphyseal lesions do not follow a similar pattern, and could not be dated with any certainty.

Father also contends the jurisdictional requirements of section 300, subdivision (e) were not met because there was no evidence the parents knew or reasonably should have known of the abuse suffered by their child, noting the child "had been alone from time to time with as many as four different persons any of whom could have abused the child." In *In re E. H.*, *supra*, 108 Cal.App.4th 659, however, the court held that the statute did not require actual knowledge on the part of the parents, and an infant who had suffered multiple nonaccidental fractures came within the statute, even though the identity of the person who committed the abuse could not be established. (108 Cal.App.4th at p. 670.) "Otherwise," the court noted, "a family could stonewall the Department and its social workers concerning the origin of a child's injuries and escape a jurisdictional finding under subdivision (e)." (*Ibid*.) The *E. H.* court also noted that "[u]nlike criminal proceedings, where establishing the identity of the perpetrator is paramount, the purpose of dependency proceedings was to fashion appropriate orders in the best interests of the child." (*Id*. at pp. 668-669.)

Father seeks to distinguish *In re E. H.* on the grounds that "one or both of the parents were *always* with the minor and there were injuries of varying ages indicating a pattern of ongoing abuse." Here, however, the evidence showed the child was with one or both parents except for short periods, and the injuries required the use of substantial force and produced significant pain. Thus, if the injuries had occurred while the child was being cared for by another family or household member, the parents should have been aware of that fact within a short period of time. The circumstantial evidence supports the finding that the parents knew or reasonably should have known the identity of the abuser. (See *In re E. H.*, *supra*, 108 Cal.App.4th at p. 670.) The court's jurisdictional findings under subdivision (e) of section 300 are supported by substantial evidence.

Mother also argues the court improperly denied reunification services pursuant to section 361.5, subdivision (b)(5), because the Department failed to fulfill its obligation to investigate and advise the court as to whether reunification was likely to be successful and whether failure to order reunification was likely to be detrimental to the child. She acknowledges, however, that the Department is not required to prove reunification efforts are likely to be unsuccessful. (See *Raymond C. v. Superior Court* (1997) 55 Cal.App.4th 159, 164.) In the case of *In re Rebekah R.* (1994) 27 Cal.App.4th 1638, on which mother relies, the dependency court had relied on an inappropriate statutory subdivision in denying reunification services, and the appellate court

concluded its implied finding was not supported by substantial evidence. (*Id*. at pp. 1650-1656.) Nor had the Department considered or advised the court in that case whether reunification between the parent and child was or was not likely to be successful. (*Id*. at p. 1653.) Here, by contrast, the court considered the appropriate statutory guidelines in denying reunification services. The social worker had considered both parents' likelihood of reunification, and concluded the parents' behavior was unlikely to change if services were offered because they continued to fail to acknowledge any problem. The court was not convinced "by any competent testimony that services [were] likely to prevent reabuse," and noted the parents' failure to cooperate with services already offered by the Department, including drug assessment and testing.[12]

Mother also argues the court failed to consider whether the child was closely and positively attached to her. She points to the testimony of the CTRP intern who had observed the interaction of mother and child, and described "a bond . . . and connection," based on eye contact between mother and child and their joint attention to a picture book on one occasion. The witness was not qualified as an expert, however, and had spent a limited amount of time observing the pair. The court was not required to give dispositive weight to her testimony in evaluating whether to override the statutory presumption against reunification services here. Our review of the record indicates the court properly discharged its duties under section 300, subdivision (c).[13]

Father contends the court failed to make a factual finding it would not benefit the child to pursue reunification services, in violation of section 361.5, subdivision (b)(6).[14] Father also

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[12] Mother also contends the social worker was not a competent professional within the meaning of the statute because she had worked in the child dependency unit for less than a year and this was the first time she had been involved in a case recommending no services. These factors, however, would be relevant to the weight to be accorded the social worker's testimony, rather than her competence as a professional.

[13] While there was also evidence that mother had been visiting the baby often and had participated in several sessions at the CTRP, the standard of review does not permit us to reweigh the evidence, but only to determine whether the lower court's findings were supported by substantial evidence. We have concluded that they are so supported, as discussed in the text.

[14] Section 361.5, subdivision (b) provides, in pertinent part: "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: ¶ . . . ¶ (6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child, a sibling, or a half-sibling by a parent or guardian, as defined in this

maintains the child has a close and positive relationship with his parents, and breaking that bond would be detrimental to the child. The record, however, discloses the court's detailed explanation of the basis for its conclusion that the child would not benefit from the provision of reunification services under the circumstances presented here. In making that determination, as required by section 361.5, subdivisions (h) and (i),[15] the court first considered the specific harm inflicted on the child, noting that his injuries had been caused by "a non-accidental, high velocity, repetitive twisting and jerking motion."[16] The court further noted: "[W]e've never had an explanation for what happened there and that's troubling to the Court." The court found the child had experienced severe emotional trauma, based upon the pain he had suffered.[17] The court further found it unlikely that the child could be safely returned to the parents in a timely manner, particularly in light of the parents' denial of responsibility: "[I]f you don't think you have anything to be treated for then how are you going to be treated for that within six

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subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian." Contrary to mother's position, this subdivision does not require a finding of scienter.

[15] Section 361.5, subdivision (h) provides: "In determining whether reunification services will benefit the child pursuant to paragraph (6) or (7) of subdivision (b), the court shall consider any information it deems relevant, including the following factors: [¶] (1) The specific act or omission comprising the severe sexual abuse or the severe physical harm inflicted on the child or the child's sibling or half-sibling. [¶] (2) The circumstances under which the abuse or harm was inflicted on the child or the child's sibling or half-sibling. [¶] (3) The severity of the emotional trauma suffered by the child or the child's sibling or half-sibling. [¶] (4) Any history of abuse of other children by the offending parent or guardian. [¶] (5) The likelihood that the child may be safely returned to the care of the offending parent or guardian within 12 months with no continuing supervision. [¶] (6) Whether or not the child desires to be reunified with the offending parent or guardian." Section 361.5, subdivision (i) provides: "The court shall read into the record the basis for a finding of severe sexual abuse or the infliction of severe physical harm under paragraph (6) of subdivision (b), and shall also specify the factual findings used to determine that the provision of reunification services to the offending parent or guardian would not benefit the child."

[16] While mother attaches significance to the lack of evidence of a history of abuse in this case, we also note the infancy of Maurice, who is the parents' first child.

[17] Mother contends the type of emotional trauma encompassed by the statute is not based on physical pain but on such experiences as a child witnessing abuse inflicted on another. We need not address this argument in any detail, as this was only one of several factors on which the court relied. Nor are we impressed with mother's argument that the pain caused by the baby's broken leg "was not unduly severe." The treating physician testified the oblique fracture would have caused an acute pain at the time it happened, followed by swelling and an inflammatory throbbing.

months?"[18] The court also observed: "[When y]ou're seeking to change behavior you have to acknowledge there is something to be changed." The court further noted the parents' failure to respond to services other than those of the CTRP, failure to keep appointments, failure to respond to repeated requests for drug assessment and testing, and level of hostility toward the social worker, sufficient to cause concerns about violence. Thus the court made the factual findings required by the statute. (See *Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, 752-753.)

While the juvenile dependency system attempts to preserve the family whenever possible, the general rule favoring reunification services no longer applies once the Department has shown by clear and convincing evidence that a dependent child falls under subdivision (e) of section 300. (*Raymond C. v. Superior Court*, *supra*, 55 Cal.App.4th at p. 164.) Under the circumstances presented here, the court properly refused services to the parents and set a permanency planning hearing.

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[18] While section 361.5, subdivision (h) refers to the likelihood the child may be safely returned to the parent within 12 months with no continuing supervision, subdivision (a)(2) of the same statute provides: "For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under the age of three years, court-ordered services shall not exceed a period of six months from the date the child entered foster care." While the court below assumed the six-month period was applicable here, its comments indicate its decision would have been the same under either standard.

DISPOSITION

The petitions for extraordinary relief are denied on their merits. (See Cal. Const., art VI, § 14; *Kowis v. Howard* (1992) 3 Cal.4th 888, 894.) Because the permanency planning hearing is set for October 1, 2003, our decision is immediately final as to this court. (Cal. Rules of Court, rule 24 (b)(3).)

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Corrigan, J.

We concur:

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McGuiness, P.J.

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Pollak, J.